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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/702,098	11/05/2003	Joel D. Martz	3070A	6812
7590 David M Warren 655 Oakland Ave. Cedarhurst, NY 11516				
EXAMINER				
JUSKA, CHERYL ANN				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
05/14/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/702,098

Applicant(s)

MARTZ, JOEL D.

Examiner

Cheryl Juska

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 February 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7, 9-22 and 24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 18-22 is/are allowed.
- 6) ☒ Claim(s) 1-7, 9-11, 14-17 and 24 is/are rejected.
- 7) ☒ Claim(s) 12 and 13 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB08)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date _____

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed February 7, 2008, has been entered. Claims 1, 4, 6, 10, and 15-17 have been amended as requested. Claims 8 and 23 have been cancelled. Thus, the pending claims are 1-7, 9-22, and 24.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1-7, 9-11, and 14-17 stand rejected under 35 U.S.C. 103(a) as being unpatentable over WO 01/98575 issued to Ellis et al. in view of US 5,612,113 issued to Irwin, Sr. and in further view of US 2002/0142126 issued to Higgins et al. as set forth in section 6 of the last Office Action (Non-Final Rejection mailed 08/07/2007).

Applicant has amended claim 1 to limit the further backing layer to being "a further abrasion-protective backing layer for protecting the membrane from abrasion." However, said amendment is insufficient to overcome the standing prior art rejection since further backing layer (i.e., secondary backing) of the cited prior art will inherently provide abrasion-protection by its mere presence between the membrane and potentially abrasive materials (i.e., presence as an outer layer of the carpet).

Additionally, applicant has amended the stabilizing layer to limit it to being "a breathable stabilizing layer in contact with the breathable membrane for dimensional stability of the

membrane and the carpet.” However, since the stabilizing layer of the cited prior art is taught as a woven or nonwoven scrim layer, it is inherently “breathable.” Also, the combination of cited prior art teaches said stabilizing layer in contact with the breathable membrane. Hence, the rejection of claims 1-7, 9-11, and 14-17 is maintained despite applicant’s amendment.

4. Claim 24 stand rejected under 35 U.S.C. 103(a) as being unpatentable over WO 01/98575 issued to Ellis et al. in view of US 5,612,113 issued to Irwin, Sr. as set forth in section 7 of the last Office Action.

Applicant has not amended claim 24. As such, the rejection stands.

Response to Arguments

5. Applicant's arguments filed with the amendment of February 7, 2008, have been fully considered but they are not persuasive.

6. Applicant traverses the 103 rejection of claims 1-7, 9-11, and 14-17 over the cited prior art of Ellis, Irwin, and Higgins by asserting the Ellis invention is inoperable (Amendment, paragraph spanning pages 6-7 and 1st paragraph, page 7). This argument is unpersuasive since applicant’s assertions are unsupported by any factual evidence. Additionally, it appears applicant is making assumptions regarding Ellis’ intent of “cleanability.” Also, said argument with respect to the pore size is, at best, only applicable to claim 17 and not claims 1-7, 9-11, and 14-16. Regarding claim 17, applicant only speculates, without any evidence provided thereto, that the membrane of Ellis does not possess the claimed resistance to liquid penetration. As such, applicant’s argument is not convincing.

7. Regarding the Irwin reference, applicant traverses the rejection by arguing the interchangeable location of Irwin's non-breathable, liquid impermeable film is not applicable to the breathable, liquid impermeable film of Ellis (Amendment, paragraph spanning pages 7-8). The examiner respectfully disagrees. Since both the membrane layer and the secondary substrate layer of the Ellis composite secondary backing are breathable, reversal of the location of the two breathable layers would not appear to hinder the overall breathability of the carpet as suggested by applicant.

8. With respect to the stabilizing layer of Higgins, it appears applicant is arguing that said layer of Higgins is not breathable since a nonwoven embodiment of said layer may include an acrylic binder (Amendment, page 8, 1st paragraph). To the contrary, Higgins clearly teaches the stabilizing layer is "relatively porous" due to its nonwoven nature (Higgins, section [0178]). Thus, Higgins clearly teaches breathable stabilizing layers.

9. Regarding applicant's arguments in the paragraph spanning pages 8-9 – 2nd paragraph, page 9, it is noted that the features upon which applicant relies (i.e., spacing of filaments of a stabilizing scrim) are not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). As such, applicant's arguments are found unpersuasive and the 103 rejection of claims 1-7, 9-11, and 14-17 over the cited prior art of Ellis, Irwin, and Higgins stands.

10. Applicant has not presented any new arguments regarding the rejection of claim 24 over Ellis in view of Irwin. Hence, the rejection of claim 24 also stands.

Allowable Subject Matter

11. Claims 12 and 13 stand objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.
12. Claims 18-22 stand allowed.
13. Said claims contain allowable subject matter because the cited prior art does not teach or suggest the claimed carpet structure including a further (i.e., secondary) backing comprising an *apertured film*.

Conclusion

14. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).
15. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.
16. Any inquiry concerning this communication or earlier communications from the

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examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached at 571-272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

17. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Cheryl Juska/
Primary Examiner
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